Fazal Ellahi Oli Mohamed & Anor v KM Oli Mohamed Sdn Bhd

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02 (NCC) (A)-1870–12 OF 2020
LEE SWEE SENG, HADHARIAH SYED ISMAIL AND GUNALAN MUNIANDY JJCA
10 MAY 2023

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Companies and Corporations — Derivative action — Application for — Application for leave to commence derivative action under ss 347 and 348 of Companies Act 2016 — Whether application for leave to commence derivative action was made in good faith and for best interest of company — Whether element of wrongdoer continued control was established — Whether alleged wrongdoer made secret profits and caused losses to company — Whether agreement entered by alleged wrongdoer on behalf of company illegal — Whether there was delay in filing application for leave to commence derivative action — Companies Act 2016 ss 347 & 348

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The respondent was a company involved in the business of selling gem jewellery and precious metals whereas the appellants were the minority shareholders of the respondent. The appellants had filed an application for leave to commence a derivative action under ss 347 and 348 of the Companies Act 2016 on behalf of the respondent against the former director of the respondent known as Mohamed Kassim a/l Oli Mohamed ('Kassim'). In this regard, the appellants argued that Kassim had breached his fiduciary duties as the director of the respondent by setting up companies known as Dazzle Jewels Sdn Bhd, Rubyoli Sdn Bhd and Lumiere De Rubis Sdn Bhd to run similar businesses with the respondent's business and systematically diverting the respondent's business to Rubyoli Sdn Bhd (via a franchise agreement between the respondent and Rubyoli) while holding the position as a director of the respondent. The High Court dismissed the appellants' application, hence, the present appeal. The appellants submitted that: (a) Kassim was not the only wrongdoer because the other directors of the respondent by the name of Rahmat and Mior who had assisted Kassim were still in control of the respondent; (b) Kassim and his companies had made secret profits and caused losses to the respondent; (c) there was no shareholders' resolution agreeing to the franchise agreement, hence, such agreement was illegal; (d) the second appellant could not determine whether the franchise agreement was valid or not because he signed the said agreement merely as a witness to Rahmat's signature; and (e) there was no delay in filing the action because Lumiere De Rubis Sdn Bhd was incorporated by Kassim in 2019 and this action was brought in 2020.

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Held, dismissing the appeal with costs of RM10,000 to the respondent subject to allocator:

(1) The court could not allow the appellants to add Rahmat and Mior as the wrongdoers when that was not the appellants' pleaded case. Further, the learned High Court judge had made a finding of fact that the appellants had not pleaded nor produced any evidence that Kassim as a wrongdoer, was in fact in control of the respondent so that he could snuff out any suggestion of an action against him. With the absence of an element of control by Kassim over the respondent's company coupled with his resignation, the learned judge had not erred when she concluded that the element of wrongdoer continued control had not been established and thus, disentitled the appellants from maintaining this derivative action (see paras 36–37).

(2) At the High Court, the appellants did not give any particulars or figures of the secret profits and the losses. At best these allegations were just a one-line statement. Such statement was insufficient to convince the court that there was some truth in the allegations. That explained why the learned judge found there was no concrete evidence adduced by the appellants to show the respondent's losses and secret profits; and that the allegations made were nothing more than mere suspicions and speculation. In a case where the trial judge had perused the affidavit evidence before making any conclusion, the court found that the facts as found by the learned judge were supported by evidence (see para 38).

(3) There was no error of law or fact in the learned judge's decision that no shareholders' resolution was required in matters involving the exercise of powers vested with the directors only. Further, based on the evidence, it was obvious that the mechanism of franchise arrangement and profit-sharing agreement was made known to the other directors of the respondent and their terms and conditions were put down into writing. The second appellant knew about this franchise scheme. As a director, it was his duty to read and understand the contents of the agreement to see if the proposed transactions were valid or not. In law, by putting his signature on the agreement, he was deemed to have read, understood and agreed to the terms and conditions stated in the agreement. In the circumstances, the court agreed with the learned judge that the second appellant had acquiesced to the franchise arrangement and was therefore estopped from claiming the franchise was illegal and that there were any wrongdoings on Kassim's part in carrying out the franchise and profit-sharing agreement (see paras 40 & 42).

(4) The appellants' first complaint in writing about Dazzle Jewel Sdn Bhd being a competitor to the respondent was through their solicitors' letter dated 23 April 2010 addressed to Kassim and the other directors of the respondent. The present action was brought in 2020. There was therefore

an inordinate delay of ten years. The learned judge took note that the appellants had not offered any explanation as to why they waited more than ten years. The court agreed with the learned judge that the delay was unacceptable and indicated a lack of bona fides. The reliefs sought by the appellants were therefore refused. The court agreed with the learned judge that a court may refuse relief to an indolent litigant (see paras 43 & 45).

[Bahasa Malaysia summary

Responden merupakan sebuah syarikat yang terlibat dalam perniagaan menjual barang kemas permata dan logam berharga manakala perayu-perayu adalah pemegang saham minoriti responden. Perayu-perayu telah memfailkan permohonan untuk mendapatkan keizinan bagi memulakan tindakan terbitan di bawah ss 347 dan 348 Akta Syarikat 2016 bagi pihak responden terhadap bekas pengarah responden yang dikenali sebagai Mohamed Kassim a/l Oli Mohamed ('Kassim'). Berhubung dengan perkara ini, perayu-perayu berhujah bahawa Kassim telah melanggar tugas fidusiarinya sebagai pengarah responden dengan menubuhkan syarikat-syarikat yang dikenali sebagai Dazzle Jewels Sdn Bhd, Rubyoli Sdn Bhd dan Lumiere De Rubis Sdn Bhd untuk menjalankan perniagaan yang serupa dengan perniagaan responden dan secara sistematik mengalihkan perniagaan responden kepada Rubyoli Sdn Bhd (melalui perjanjian francais antara responden dan Rubyoli) ketika dia memegang jawatan sebagai pengarah responden. Mahkamah Tinggi menolak permohonan perayu-perayu, justeru, rayuan semasa. Perayu-perayu berhujah bahawa: (a) Kassim bukanlah satu-satunya pesalah kerana pengarah-pengarah lain responden yang bernama Rahmat dan Mior yang telah membantu Kassim masih mengawal responden; (b) Kassim dan syarikat-syarikatnya telah membuat keuntungan rahsia dan menyebabkan kerugian kepada responden; (c) tiada ketetapan pemegang saham yang bersetuju dengan perjanjian francais tersebut, oleh itu, perjanjian tersebut adalah menyalahi undang-undang; (d) perayu kedua tidak dapat menentukan sama ada perjanjian francais tersebut sah atau tidak kerana dia menandatangani perjanjian tersebut semata-mata sebagai saksi bagi tandatangan Rahmat; dan (e) tiada kelewatan memfailkan tindakan kerana Lumiere De Rubis Sdn Bhd telah diperbadankan oleh Kassim pada 2019 dan tindakan ini telah dibuat pada 2020.

Diputuskan, menolak rayuan dengan kos sebanyak RM10,000 kepada responden tertakluk kepada alokatur:

(1) Mahkamah tidak boleh membenarkan perayu-perayu menambah Rahmat dan Mior sebagai pesalah-pesalah sedangkan itu bukan kes yang diplid oleh perayu-perayu. Selanjutnya, hakim Mahkamah Tinggi yang bijaksana telah membuat dapatan fakta bahawa perayu-perayu tidak memplid atau mengemukakan apa-apa keterangan bahawa Kassim sebagai pesalah, sebenarnya mengawal responden agar dia boleh menolak

A apa-apa cadangan tindakan terhadapnya. Dengan ketiadaan unsur kawalan oleh Kassim ke atas syarikat responden serta peletakan jawatannya, hakim yang bijaksana tidak terkhilaf apabila beliau membuat kesimpulan bahawa unsur kawalan berterusan pesalah gagal dibuktikan dan dengan itu, perayu-perayu tidak berhak untuk B mengekalkan tindakan terbitan ini (lihat perenggan 36–37).

(2) Di Mahkamah Tinggi, perayu-perayu tidak memberikan apa-apa butiran atau angka mengenai keuntungan rahsia dan kerugian tersebut. Paling baik pun dakwaan ini hanyalah kenyataan sebaris. Kenyataan sedemikian C tidak mencukupi untuk meyakinkan mahkamah bahawa terdapat kebenaran dalam dakwaan tersebut. Itu menjelaskan mengapa hakim yang bijaksana mendapati tiada keterangan konkrit dikemukakan oleh perayu-perayu untuk menunjukkan kerugian dan keuntungan rahsia responden; dan bahawa dakwaan yang dibuat tidak lebih daripada syak D wasangka dan spekulasi semata-mata. Dalam kes di mana hakim bicara telah meneliti keterangan afidavit sebelum membuat apa-apa kesimpulan, mahkamah mendapati fakta seperti yang didapati oleh hakim yang bijaksana adalah disokong oleh keterangan (lihat perenggan 38).

E

(3) Tiada kekhilafan undang-undang atau fakta dalam keputusan hakim yang bijaksana bahawa tiada ketetapan pemegang saham diperlukan dalam perkara yang melibatkan pelaksanaan kuasa yang diberikan kepada pengarah sahaja. Selanjutnya, berdasarkan keterangan, adalah F jelas bahawa mekanisme pengaturan francais dan perjanjian perkongsian keuntungan tersebut telah dimaklumkan kepada pengarah-pengarah responden yang lain dan terma dan syaratnya telah dimaklumkan secara bertulis. Perayu kedua tahu tentang skim francais ini. Sebagai pengarah, adalah menjadi kewajipan beliau untuk membaca dan memahami G kandungan perjanjian untuk melihat sama ada transaksi yang dicadangkan tersebut adalah sah atau tidak. Dalam undang-undang, dengan meletakkan tandatangannya pada perjanjian tersebut, dia dianggap telah membaca, memahami dan bersetuju dengan terma dan syarat yang dinyatakan dalam perjanjian tersebut. Dalam keadaan H sedemikian, mahkamah bersetuju dengan hakim yang bijaksana bahawa perayu kedua telah bersetuju dengan pengaturan francais tersebut dan oleh itu dihalang daripada mendakwa francais tersebut menyalahi undang-undang dan bahawa terdapat apa-apa salah laku di pihak Kassim dalam melaksanakan perjanjian francais dan perkongsian keuntungan I tersebut (lihat perenggan 40 & 42).

(4) Aduan pertama perayu-perayu secara bertulis mengenai Dazzle Jewel Sdn Bhd sebagai pesaing kepada responden adalah melalui surat peguamcara mereka bertarikh 23 April 2010 yang ditujukan kepada Kassim dan pengarah-pengarah responden yang lain. Tindakan semasa telah

difailkan pada tahun 2020. Oleh itu, terdapat kelewatan yang melampau selama sepuluh tahun. Hakim yang bijaksana mengambil maklum bahawa perayu-perayu tidak memberikan apa-apa penjelasan mengapa mereka menunggu lebih daripada sepuluh tahun. Mahkamah bersetuju dengan hakim yang bijaksana bahawa penangguhan tersebut tidak boleh diterima dan menunjukkan kekurangan bona fides. Oleh yang demikian, relif-relif yang dimohon oleh perayu-perayu telah ditolak. Mahkamah bersetuju dengan hakim yang bijaksana bahawa mahkamah boleh menolak relif bagi pihak litigasi yang tidak bersungguh-sungguh (lihat perenggan 43 & 45).]

Cases referred to

Celcom (M) Bhd v Mohd Shuaib Ishak [2011] 3 MLJ 636, CA (refd)
John Shaw & Sons (Salford) Limited v Peter Shaw and John Shaw [1935] 2 KB 113, CA (refd)
Ong Keng Huat v Fortune Frontier (M) Sdn Bhd & Anor [2015] 11 MLJ 604, HC (refd)
Prudential Assurance Co Ltd v Newman Industries Ltd and others (No 2) [1982] 1 All ER 354, CA (refd)
Senson Auto Supplies Sdn Bhd, Re [1988] 1 MLJ 326 (folld)

Legislation referred to

Companies Act 2016 ss 347, 348, 348(2), (4)

Appeal from: *Fazal Ellahi Oli Mohamed & Anor v KM Oli Mohamed Sdn Bhd* [2020] MLJU 2328 (High Court, Kuala Lumpur)

Dhiyana Shila a/p Vasanthan (with Syamala a/p Jeyaraman) (Dhyan & Co) for the appellants.
Mohamad Amir (with Kamal Hadi) (Hadi & Hakim) for the respondent.

Hadhariah Syed Ismail JCA (test):

INTRODUCTION

[1] Via originating summons filed on 1 July 2020, pursuant to ss 347 and 348 of the Companies Act 2016,the appellants prayed for among others, an order that:

(a) The appellants be granted leave by this Court to institute an action in the name of the respondent against Mohamed Kassim a/l Oli Mohamed (Kassim) as director of the respondent and other companies connected/related with Mohamed Kassim a/l Oli Mohamed being Lumiere De Rubis Sdn Bhd, Rubyoli Sdn Bhd and Dazzle Jewel Sdn Bhd together with other ancillary orders and costs.

[2] The leave application was dismissed by the High Court on 9 November 2020. The decision of the High Court was unanimously affirmed by this court on 13 October 2022.

[3] The High Court dismissed the appellants' application on the following grounds:

(a) since Kassim resigned as a director of the respondent two days after s 348, notice was served on the respondent by the appellants, there was an absence of a wrongdoer (Kassim) being in control of the respondent. As such, it disentitles the appellants from maintaining the derivative action and concluded the application is incompetent and not properly constituted;

(b) that the appellants have not been able to show a reasonable semblance of merit in their claim in that the appellants have failed to prove by concrete evidence that the respondent has suffered any damage by reason of Kassim and his related companies;

(c) that the appellants have only raised a suspicion of a possible breach of Kassim's duties but did not make out a prima facie case;

(d) from the minutes of meeting, the second appellant knew of the franchise arrangement. Further, he was a party to the franchise agreement and cannot now blow hot and cold;

(e) the franchise and profit sharing agreements are within the business judgment of the directors of the respondent which the court will not interfere;

(f) the second appellant is estopped from claiming there is a wrongdoing on the part of Kassim concerning the franchise and profit sharing agreement based on the surrounding circumstances;

(g) there is an unacceptable delay of ten years in bringing this action against Kassim as director;

(h) since the first appellant is carrying out a similar business in Bangsar Shopping Centre, it is akin to the pot calling the kettle black; and

(i) that there is a lack of good faith on the part of the appellants.

BRIEF FACTS

[4] The respondent, KM Oli Mohamed Sdn Bhd was incorporated in 1984. It carries on the business of selling gem jewellery and precious metals.

[5] The appellants are minority shareholders of the respondent. The first appellant holds 25,001 shares and the second appellant holds 41,094 shares of the respondent.

[6] The directors of the respondent at the material times are Mohamed Kassim a/l Oli Mohamed (Kassim), Mior Idris bin Mior Jaafar (Mior), Rahmatullah a/l Oli Mohamed (Rahmat) and Shah Jehan s/o KM Oli Mohamed (Shah Jehan).

[7] The main directors responsible for managing the respondent at the material times are Kassim and Rahmat.

[8] Due to misunderstanding with his family members, the first appellant resigned as director of the respondent on 30 November 1997. He then took over a company called Faiq Jewel Sdn Bhd, carrying on similar business as the respondent and on the same floor with the respondent at Bangsar Shopping Centre. After his resignation, the first appellant no longer involve himself with the respondent.

[9] Beginning with the year 2008, Kassim set up three companies carrying business similar as the respondent. The companies with their respective date of incorporation are set out below:

(a) 2008 — Dazzle Jewels Sdn Bhd;

(b) 2009 — Rubyoli Sdn Bhd; and

(c) 2019 — Lumiere De Rubis Sdn Bhd.

[10] The directors and shareholders of these three companies are Kassim, his wife and his family members.

[11] The appellants alleged that in setting up these companies while he was still a director of the respondent, Kassim has breached his director's duties, diverted the respondent's business to his related companies and made secret profits. It is said that his conduct had caused losses and damage to the respondent.

[12] The business relationship between each of Kassim's companies with the respondent is described by the appellants briefly as follows:

(a) Dazzle Jewels Sdn Bhd:

(i) Dazzle Jewel bought jewellery from the respondent's supplier on consignment and thereafter, sold it for a profit to the respondent. If the items purchased are not saleable, the costs of purchasing these

items are borne by the respondent; and

(ii) although the respondent acknowledged the consignment transaction, these transactions were never disclosed to any of the shareholders and the other directors of the respondent.

(b) Rubyoli Sdn Bhd:

(i) Kassim moved jewellery stock of the respondent to Rubyoli's business place at Intermark, Jalan Tun Razak, Kuala Lumpur and sold these jewelleries and he enjoyed/earned the profit;

(ii) Kassim also caused the respondent to pay for the advertisements of Rubyoli which represented to the public that both KM Oli Mohamed and Rubyoli is one and the same;

(iii) Kassim then moved the main server of the respondent to the business place of Rubyoli. The main server contains confidential information of the respondent's accounts, stocks etc;

(iv) Kassim did all these under a disguise of a franchise agreement entered into between Rubyoli and the respondent;

(v) by reason of Kassim's conduct, the franchisee (Rubyoli) was in control of the franchisor (respondent) and diverting the respondent's business to itself;

(vi) the franchise was never registered in law by the respondent; and

(vii) no shareholder resolution was passed agreeing to this franchise agreement.

(c) Lumiere De Rubis Sdn Bhd:

(i) Lumiere carry its business under the brand name of K & Co;

(ii) in addition to dealing with Lumiere's customers, Kassim was also seen taking the respondent's customers to Lumiere's business premises and handing out his name card as being part of the business of Lumiere; and

(iii) Kassim used similar website with the respondent. The only difference is respondent carries its own logo and Lumiere website used K & Co.

[13] For his continuing breaches of fiduciary duties in setting up companies to run similar businesses and systematically diverting the respondent's business while holding the position as a director of the respondent, the appellants issued a notice under s 348(2) of the Companies Act 2016 to the respondent to request that the board of directors' immediately sanction the issuance of a letter of demand to Kassim and thereafter, institute legal action against him for

breach of director's duties and recover all losses and damage suffered by the respondent.

[14] The said notice was acknowledged receipt by the respondent on 27 February 2020.

[15] There was no response by the respondent to the said notice. On 1 July 2020, the appellants filed this originating summons.

[16] The appellants believe that the respondent has a bona fide claim against Kassim for his breach of fiduciary duties, has reasonable prospect of success; the application is not based on any collateral purpose and for the benefit of the respondent.

DEFENCE RAISED BY THE RESPONDENT

[17] In not wanting to take legal action against Kassim, the respondent alleged that:

(a) the appellants have brought this action with malicious intent in that the first appellant had previous misunderstandings with the shareholder and directors in the past and he had resigned. However, he brought certain civil actions against the company which disrupted the business of the respondent;

(b) this action is a personal attack against Kassim;

(c) Kassim has resigned as a director of the respondent on 29 February 2020;

(d) Kassim is not a shareholder or director of Dazzle Jewels and there is no reason to sue him;

(e) Dazzle Jewels' relationship is only based on the consignment transaction carried on with the respondent;

(f) the relationship between the respondent and Rubyoli is based on a franchise agreement dated 25 August 2010 which was executed by Rahmat for the respondent and Kassim for Rubyoli;

(g) the purpose of setting up Rubyoli by Kassim was to move the respondent's stock and to sell it at Rubyoli's premises;

(h) Kassim had informed the respondent and some other shareholder about the shifting of business premises from Bangsar Shopping Complex to Intermark and other matters by way of notice dated 26 September 2010;

(i) Rubyoli is a franchise company of the respondent and was allowed to use the name and reputation for promotion of its products based on the terms of the franchise agreement;

(j) while acknowledging that Lumiere was carrying out the same business as the respondent, the respondent states that it has no connection with Lumiere's business;

(k) after his resignation as director of the respondent, Kassim has been appointed on an ad hoc basis as marketing advisor; and

(l) the web page produced is a test page and not that of the respondent.

THE APPEAL

[18] The appellants submitted that the learned High Court judge had erred in dismissing the appellants' application for the following reasons:

(a) this action was brought in good faith and in the best interest of the company;

(b) Kassim is liable despite his resignation; and

(c) there was no delay in bringing the action.

THE LAW ON LEAVE TO COMMENCE A DERIVATIVE ACTION

[19] Section 348(4) of the Companies Act 2016 provides as follows:

> (4) In deciding whether or not leave shall be granted, the Court shall take into account whether:
>
> (a) the complainant is acting in good faith; and
>
> (b) it appears prima facie to be in the best interest of the company that the application for leave be granted.

[20] The test of good faith is twofold. First, the appellants honestly believe that a good cause of action exists and that it has a reasonable prospect of success. Secondly, the appellants is not bringing the derivative suit for a collateral purpose: see *Celcom (M) Bhd v Mohd Shuaib Ishak* [2011] 3 MLJ 636; and *Ong Keng Huat v Fortune Frontier (M) Sdn Bhd & Anor* [2015] 11 MLJ 604.

THE APPELLANTS' SUBMISSION

[21] It is submitted that Kassim's resignation as director of the respondent does not absolve him from liability. Otherwise, a director who commits wrongdoings can avoid derivative action being brought against him by resigning upon receipt of a s 348 notice. In this case, it is submitted that Kassim

is not the only wrongdoer. The other directors, Rahmat and Mior who had assisted Kassim in his wrongdoings are currently in control of the respondent. Therefore, the wrongdoers are still in control of the respondent, despite Kassim's resignation. In the circumstances, it is submitted that the learned judge is wrong in holding there is an absence of a controlling party in the respondent which renders this leave application incompetent.

[22] The previous civil actions instituted by the first appellant against the respondent and the directors of the respondent (against Rahmat, Kassim and Mior) are for different causes of action. The action against the respondent is for his (first appellant) director's fees due and owing for which the respondent compensated the first appellant. The suit against Rahmat, Kassim and Mior is for defamation for which the Court of Appeal found in favour of the first appellant and Rahmat, Kassim and Mior were ordered to pay damages of RM30,000 and costs of RM20,000 to the first appellant. The outcome of these civil suits prove that these are genuine claims and absence of malice on the part of the first appellant to disrupt the respondent's business. Similarly, the present action was brought by the first appellant in good faith with no collateral purpose.

[23] By his conduct, Kassim had allowed the respondent to enter into an illegal arrangement for the benefit of his related companies. Therefore, it is submitted that the franchise agreement is void ab initio and Kassim is liable to the respondent for the losses suffered by the company by reason of transacting with Rubyoli.

[24] Although the franchise agreement dated 25 August 2010 was witnessed by the second appellant (AR *Jld* 2B pp 251–286), he is not a director who is responsible for the daily running of the respondent to ensure that the franchise is properly registered in favour of the respondent so that the respondent enters into a valid transaction. Therefore, it is submitted that the conclusion drawn by the learned judge that the second appellant is estopped from challenging the franchise arrangement is flawed as the second appellant only witnessed Rahmat's signature on behalf of the respondent and had no authority as director to ensure that it was a valid transaction in law.

[25] Although the initial notices were sent by the first appellant in year 2010, the actions of Kassim were continuing in that he systematically formed companies since the year 2010 and diverted the respondent's business to himself and his related companies. The latest company, Lumiere was formed in 2019. Therefore, it is submitted that the issue of delay does not arise in this case.

RESPONDENT'S SUBMISSION

[26] Rubyoli Sdn Bhd was incorporated based on the franchise and profit sharing agreement proposal plan dated 31 January 2005 and 8 September 2008 (exh ROM3) which was discussed between several of the respondent's directors and shareholders and within the knowledge of the second appellant.

[27] The respondent and Rubyoli had entered into a franchise agreement on 25 August 2010 and the agreement was signed and agreed to by the second appellant as the respondent's representative to appoint Rubyoli as one of the respondent's franchise companies.

[28] All businesses, transactions and/or collaboration between the respondent and Rubyoli involving the franchise business are based on the franchise agreement dated 25 August 2010.

[29] Even if Dazzle Jewel had purchased goods from the same supplier as the respondent, it should not be an issue as the supplier does not have any obligation to supply the goods exclusively to the respondent.

[30] Dazzle Jewel's business relationship with the respondent is limited to the consignment transaction as stated in the letter dated 27 May 2010 issued by the respondent's solicitor to the first appellant's solicitor (exh F10).

[31] Lumiere was never involved and/or interfered in any of the respondent's business.

[32] There is no evidence adduced by the appellants to show that the respondent has suffered any kind of loss. Neither was there any evidence tendered on the secret profit.

[33] The element of wrongdoer control has not been established by the appellants. The appellants had suggested that Kassim was the wrongdoer. However, there was nothing pleaded nor evidence produced by the appellants to prove that Kassim as a wrongdoer, was in fact in control of the respondent company so that he can snuff out any suggestion of an action against him.

OUR DECISION

[34] We shall deal first with the preliminary requirement of wrongdoer in control of the company. In *Prudential Assurance Co Ltd v Newman Industries Ltd and others (No 2)* [1982] 1 All ER 354, it was held that:

Although the proper plaintiff in an action in respect of a wrong done to a company was prima facie the company itself, exceptionally a minority shareholder could bring a derivative action where the wrong done to the company amounted to fraud and the wrongdoers were themselves in control of the company and thus able to prevent the company from suing; but when such an action was brought by a minority shareholder the question whether in fact the company was controlled by the alleged wrongdoers should first be determined before the derivative action itself was allowed to proceed.

[35] In the present case, it is not disputed that Kassim had resigned as a director on 29 February 2020. The appellants had specifically pleaded that Kassim was the wrongdoer who not only had set up three companies of his own but also implemented a franchise arrangement with the respondent. With Kassim's resignation, the appellants now alleged Kassim is not the only wrongdoer. The other directors of the respondent, namely, Rahmat and Mior who had assisted Kassim in his wrongdoings are still in control of the respondent.

[36] We disagree with the appellants. We find nowhere in the appellants' affidavit, allegations being made that Rahmat and Mior had assisted Kassim in his wrongdoings and therefore they are also wrongdoers who are currently in control of the respondent. In our view the allegations against Rahmat and Mior is an afterthought by the appellants to overcome the absence of Kassim being the solely targeted original wrongdoer. The appellants are bound by their affidavit's evidence. Thus, we cannot allow the appellants to add another wrongdoers when that was not the appellants' pleaded case.

[37] Further, the learned High Court judge has made a finding of fact that the appellants had not pleaded nor produced any evidence that Kassim as a wrongdoer, was in fact in control of the respondent so that he can snuff out any suggestion of an action against him. With the absence of an element of control by Kassim over the respondent's company coupled with his resignation, we find the learned judge had not erred when she concluded that the element of wrongdoer continued control has not been established and thus, disentitled the appellants from maintaining this derivative action.

[38] Moving on to the appellants' allegation that Kassim and his companies had made secret profits and caused losses to the respondent. We take note that at the High Court, the appellants did not give any particulars or figures of the secret profits and the losses. At best these allegations are just a one-line statement. Such statement is insufficient to convince the court that there is some truth in the allegations. That explains why the learned judge found there was no concrete evidence adduced by the appellants to show the respondent's losses and secret profits; and that the allegations made are nothing more than mere suspicions and speculation. In a case where the trial judge had perused the

affidavit evidence before making any conclusion, we find the facts as found by the learned judge are supported by evidence.

[39] The next issue raised by the appellants is the illegal franchise and profit sharing agreement. The crux of the appellants' complaint is there was no shareholders' resolution agreeing to the franchise arrangement. To answer this issue, the learned judge refers to the case of *John Shaw & Sons (Salford) Limited v Peter Shaw and John Shaw* [1935] 2 KB 113 (CA) where Greer LJ said:

> If powers of management are vested in the directors, they and they alone can exercise those powers. The only way in which the general body of shareholders can control the exercise of the powers vested in the directors is by altering their (constitution), or by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the (corporation's constitution) is vested in the directors any more than the directors can usurp the powers vested in the general body of shareholders.

[40] Based on *John Shaw*'s case, the learned judge held no shareholders' resolution is required in matters involving the exercise of powers vested with the directors only. We find no error of law or fact in the decision reached by the judge.

[41] To put matters in their prespective, we find the franchise and profit sharing agreement is documented by the following documents:

(a) notice dated 26 September 2010 from Kassim to the other directors of the respondent namely Rahmat, Shah, Careem and Beda. The notice titled 'Moving to operate KM Oli Franchise at the Intermark';

(b) minutes of Special Meeting For KM Oli Mohamed dated 11 June 2008. Presence at the meeting are Rahmat, Kassim, Careem and Jubaitha;

(c) franchise and profit sharing proposal plan dated 31 January 2005;

(d) KM Oli Franchise (Special Franchisee Terms for Directors) dated 8 September 2008; and

(e) franchise agreement dated 25 August 2010 between the respondent and Rubyoli Sdn Bhd. Rahmat and second appellant signed the agreement on behalf of the respondent (see p 238 Appeal Record *Bhg* C *Jld* 2B).

[42] Looking at these documents, it is obvious to us that the mechanism of franchise arrangement and profit sharing agreement was made known to the other directors of the respondent and their terms and conditions were put down into writing. The second appellant knew about this franchise scheme. His defence that he signed the franchise agreement merely as a witness to Rahmat's signature and therefore he is incapable to determine whether the franchise is valid or not cannot be accepted. As a director, it is his duty to read

and understand the contents of the agreement to see if the proposed transactions are valid or not. In law, by putting his signature on the agreement, he is deemed to have read, understood and agreed to the terms and conditions stated in the agreement. In the circumstances, we agree with the learned judge that the second appellant had acquiesced to the franchise arrangement and is therefore estopped from claiming the franchise is illegal and that there were any wrongdoings on Kassim's part in carrying out the franchise and profit sharing agreement.

[43] Finally, on the issue of delay. The appellants took the position there is no delay because Lumiere De Rubis Sdn Bhd was incorporated by Kassim in 2019 and this action was brought in 2020. We disagree with the appellants. The appellants' first complaint in writing about Dazzle Jewel Sdn Bhd being a competitor to the respondent was through their solicitors' letter dated 23 April 2010 (p 179 Appeal Record Part C, *Jld* 2B) addressed to Kassim and the other directors of the respondent. This action was brought in 2020. There is an inordinate delay of ten years. The learned judge took note that the appellants have not offered any explanation as to why they waited more than ten years.

[44] In *Re Senson Auto Supplies Sdn Bhd* [1988] 1 MLJ 326, Edgar Joseph Jr found lack of good faith when there was a delay in prosecuting a claim. His Lordship said:

> Secondly, I noted that the major matters complained about by the petitioners appear to have been spread out over a considerable period of time. It is settled law that delay by petitioners in initiating proceedings after they have realised that they have been victims of a scheme of oppression will induce the court to refuse relief, since this indicates that they have acquiesced in the conduct complained about and their complaints are not therefore made in good faith (see *Re Jermyn Street Turkish Baths Ltd* [1971] 3 All ER 184).

[45] Relying on *Re Senson*'s case, the learned judge rightly concluded that the delay is unacceptable and indicates a lack of bona fides. The reliefs sought by the appellants were therefore refused. We agree with the learned judge that a court may refuse relief to an indolent litigant.

[46] To conclude, we find the learned judge had taken all relevant factors into consideration in determining whether the requirement for leave to commence derivative action has been satisfied. We agree with the learned judge that the appellants had not explained why they had taken some ten years to commence this action. Delay coupled with the appellants' failure to show prima facie evidence of the respondent's losses raised grave doubt in the bona fide of the appellants' action. We find no error of law or fact to justify our

A interference in the decision reached by the learned judge. The appeal is therefore dismissed with costs of RM10,000 to the respondent subject to allocator.

Appeal dismissed with costs of RM10,000 to respondent subject to allocator.

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Reported by Dzulqarnain Ab Fatar

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